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***THE UNIVERSAL PERIODIC REVIEW - IS THERE LIFE BEYOND NAMING AND SHAMING IN  
HUMAN RIGHTS IMPLEMENTATION?***

**Dr. Elvira Domínguez Redondo\***

**Abstract**

The article examines the traditional manner in which human rights implementation has been focused on confrontational approaches, in particular on the practice of “naming-and-shaming”, while more cooperative models of have been traditionally overlooked. Through the prism of the Universal Periodic Review (UPR) it tests the effectiveness of non-confrontational approaches to human rights implementation. The paper challenges the conventional wisdom among human rights advocates that non-confrontational mechanisms are synonymous with lack of efficiency and impact, and suggests that some of the commitments made by states during the UPR process could be interpreted as potential sources of obligations under International Law.

**INTRODUCTION**

Much ink has been split on debates over the universality and the normative content of human rights. Far less energy has been devoted towards an analysis of the different conceptions as to the best mechanisms for their enforcement. “Naming and shaming” is the most widely used pressure mechanism by international bodies in charge of monitoring human rights compliance. Other “confrontational approaches” to human rights implementation, as we will

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define them in the context of these pages, have also been used to put pressure on States in order to compel them to improve their human rights record. While there is a welcome growing body of scholarship assessing the efficiency of these confrontational approaches to human rights implementation, more cooperative mechanisms to promote human rights compliance are often overlooked. This is largely due to the articulation of human rights as legal claims which imply an emphasis on accountability mechanisms for implementation. Because human rights violations are an expression of a breach of law, some process of adjudication of responsibility, leading to the punishment of the violators and the redress of victims is expected.

Through the prism of the Universal Periodic Review (UPR) the following pages test the outcomes of the most universal non-confrontational approach to human rights implementation. This article seeks to refute one of the most prominent criticisms concerning the newest of international mechanisms for the promotion and protection of human rights. It has been claimed that this new mechanism could not be successful precisely because it relies on co-operation more than confrontation. In the following pages it is argued that the UPR can have an added value for the human rights implementation machinery, precisely if it retains its perception among States of being a predominantly co-operative tool of the human rights regime, supplementing but not replacing the work already completed by the UN charter and treaty-based bodies with mandates for the promotion and protection of human rights and complimenting their on-going activities. This does not necessarily mean that the impact of the UPR should be constrained to the political realm with little to no legal teeth. Some of the features of this procedure provide space to argue for the legal relevance of the outcomes of the reviews, particularly the consideration of unilateral acts of States as sources of international obligations. With this purpose, the article is divided into four sections. The first

outlines the features of the Universal Periodic Review and the main criticisms directed towards it, the second section clarifies the meaning of, and distinctions between, “confrontational” and “co-operative” approaches to the implementation on human rights. It also addresses the rationale behind the use of confrontational approaches towards human rights implementation, with particular focus on the tendency to see judicial adjudication as the most appropriate model for their realization. This is followed in part three by an examination of the traditional manner in which human rights implementation and scrutiny have been conducted, focusing in particular on the practice of “naming-and-shaming”, its modalities and our understanding of its effectiveness and limitations as the primary mechanism for the promotion and protection of human rights. The final section engages in an analysis of the process and outcomes of the Universal Periodic Review (UPR). This will enable us to explore the hypothesis that a non-confrontational, and non-selective country mechanism may be the optimum strategy, or at least a reasonable strategy, to promote and protect human rights. The paper concludes that the dynamics established in the operation of the UPR reveal that non-confrontational mechanisms are not always synonymous with lack of impact and their outcomes do not necessarily have lesser legal weight than those of traditional confrontational approaches. On the contrary, it will be argued that the body of information resulting from the process and some of the commitments made by states in the course of the UPR could be interpreted as evidence of *opinio juris*, or as potential sources of obligations under International Law.

## **The Universal Periodic Review and its Critics**

### *A. The Universal Periodic Review in a nutshell*

The former UN Secretary General, Kofi Annan proposed a “peer review” mechanism to

monitor human rights world wide as part of his programme of reform launched in 2005.<sup>1</sup> The foundations of the mechanisms were outlined in GA Res 60/251 of 16 March 2006 creating the Human Rights Council, where its paragraph 5 ordered the newly established organ to:

...undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies.<sup>2</sup>

It took one year more for the so called “institution-building package” to be approved

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<sup>1</sup> *In Larger Freedom: Development, Security and Human Rights for all-Addendum: Human Rights Council Explanatory Note*, UN doc. A/59/2005/Add.1, paragraphs 6 and 7. See also alternative models proposed by Canada presented as “Model A: The Comprehensive Approach” and “Model B: The Interactive dialogue”, in *Human Rights. Peer Review. Draft Concept and Option Paper Prepared by Canada*, Report of the Workshop on the Reforms of the UN Human Rights Mechanisms, Annex III, Lausanne, Switzerland, 2 May 2005 (available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intorg/un/missny/59/misc.Par.0002.File.tmp/050502-EN.pdf>). This non-paper is also available at [http://www.eyeontheun.org/assets/attachments/documents/human\\_rights\\_peer\\_review\\_canada.pdf](http://www.eyeontheun.org/assets/attachments/documents/human_rights_peer_review_canada.pdf). For a non-governmental proposal recommending the adoption of a model following existing monitoring mechanisms implemented by the International Labour Organisation and the World Trade Organisation see, *Amnesty International's Ten-point Program for the Creation of an Authoritative and Effective Human Rights Council*, AI doc., AI Index: IOR 41/068/2005, 1 November 2005. See also Meghna Abraham, *A New Chapter for Human Rights. A Handbook on issues of transition from the Commission on Human Rights to the Human Rights Council* (International Service of Human Rights and Friedrich Ebert Stiftung, June 2006) 72; Walter Kälin, *Towards a UN Human Rights Council*, 4 August 2004 (proposal available at [http://www.humanrights.ch/upload/pdf/050107\\_kaelin\\_hr\\_council.pdf](http://www.humanrights.ch/upload/pdf/050107_kaelin_hr_council.pdf)); and Elvira Domínguez-Redondo “¿Debe desaparecer la Comisión de Derechos Humanos de Naciones Unidas? [Should the UN Commission on Human Rights Have Disappeared?]” in José M Beneyto and Belén Becerril (dirs.), *Una Nueva organizacion de Naciones Unidas para el Siglo XXI* (Instituto Universitario de Estudios Europeos de la Universidad CEU-San Pablo, Madrid, 2007) 109 at 120-140.

<sup>2</sup> UN GA Res 60/251, paragraph 5(e).

providing details about the future functioning of the UPR, which started operating in April 2008.<sup>3</sup> The Universal Periodic Review (UPR) has been designed to appraise the human rights records of every State Member of the United Nations. Strictly speaking the review of countries human rights situations is only the first stage of a three stages process involved in the mechanism. The review is followed by the implementation of the recommendations accepted and commitments made by the States during the first stage, and culminates at the subsequent review with reporting on the progress made since the previous review.

During the UPR process, the enjoyment of all human rights in all States is reviewed.<sup>4</sup> The benchmarks used as basis of the review consist of a combination of universal human rights standards and standards flowing from the specific human rights obligations and commitments of the State under review. The benchmarks are derived from: 1) the UN Charter; 2) the Universal Declaration on Human Rights; 3) human rights instruments to which the State under review is party; 4) voluntary pledges and commitments made by the State, including those undertaken when presenting its candidature for election to the Human Rights Council; and 5) applicable International Humanitarian Law.<sup>5</sup> The review mechanism is based on an inter-governmental dialogue (peer review), with the participation of other

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<sup>3</sup> HRC Res. 5/1 on Institution Building of the Human Rights Council, Annex, paragraphs 1-4 (18 June 2007). See also HRC Dec. 6/102, General Guidelines for the Preparation of Information under the Universal Periodic Review (27 September 2007); HRC Presidential Statement PRST/8/1, Modalities and Practices for the Universal Periodic Review (9 April 2008); HRC Presidential Statement PRST/9/2, Follow-up to President's statement 8/1 (24 September 2008); HRC Res. 16/21, Annex, Review of the work and functioning of the Human Rights Council (25 March 2011); and HRC Dec. 17/119, Follow up to the Human Rights Council Resolution 16/21 with regard to the Universal Periodic Review (17 June 2011)

<sup>4</sup> This is one of the most important advantages of the UPR, since "it epitomizes the unity of human rights", Christian Tomuschat, "Universal Periodic Review: A New System of Interantional Law with Specific Ground Rules", in Ulrich Fastenrath e.a. (eds.) *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Oxford University Press, New York, 2011) 609 at 615.

<sup>5</sup> HRC Res 5/1, paragraph 1.

stakeholders, conducted in a cooperative spirit.<sup>6</sup>

The first stage of the review is conducted by a working group of the Human Rights Council, formed by its 47 members, known as the UPR Working Group, and consists of three steps. First, the country under review offers an assessment of its own human rights records. Then, the other UN State members have an opportunity to engage in a collective dialogue and assessment of the country under review, and make recommendations for improvement. The basis for this dialogue are the three documents identified in paragraph 15 of the annex to the Human Rights Council Res 5/1, that is, the State under review's presentation; a compilation of information contained in the reports of treaty bodies, special procedures and other relevant UN official documents; and a summary, prepared by the Office of the High Commissioner for Human Rights, of additional reliable information provided by other relevant stakeholders (mainly NGOs, civil society organisations and the national human rights institutions). The UPR Working Group session ends with the issuing of an "Outcome Report" submitted to the plenary of the Human Rights Council for adoption by a formal decision. A group of three States, the *troika*, is selected by drawing lots among State members of the Human Rights Council, with the mandate of facilitating the UPR Working Groups' task. The *troika* is the first recipient of questions raised by States ahead of the review, and it is expected to cluster these in accordance with the content and structure of the report prepared by the State under Review. The *troika* then drafts the Outcome Report with the full involvement of the State concerned and the cooperation of the OHCHR. The report is factual, based on the proceedings, and is required to reflect the recommendations and/or conclusions offered by delegations during the interactive dialogue. States under review are required to communicate to the Council in writing if they are accepting or rejecting the recommendations, preferably

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<sup>6</sup> On the terminology "peer-review" see Elvira Domínguez-Redondo "The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session" (2008) 7(3) *Chi J Int'l L* 721 at 725-6.

clustered thematically in the Outcome Report.<sup>7</sup>

Having completed the review of all the UN State members in October 2011, the first cycle served to consolidate rules and establish practices governing the review and its follow-up, and to introduce additional rules which have become operative during the second review cycle, commencing in June 2012.

In addition to the three documents cited above as basis for the review (the report of the State under review, the UN compilation, and the summary of other stakeholders' information) , the second and subsequent cycles of the review aspire to focus on "the implementation of the accepted recommendations and the development of human rights situations in the State under review".<sup>8</sup> The HRC has adopted general guidelines to assist countries under review in preparing the information they have to submit. In particular, States are recommended to adopt the following structure: a) description of the methodology and consultation process followed for the preparation of the information provided; b) a background overview of the developments in the promotion and protection of human rights since the previous review; c) a section on the promotion and protection of human rights on the ground addressing the implementation of the human rights obligations identified as the "basis of review" in resolution 5/1 as outlined above; d) a presentation of the follow-up to the previous review; e) identification of achievements, best practices and challenges in relation to the implementation of accepted recommendations; f) identification of key national priorities, initiatives and commitments to overcome those challenges and improve human rights situation in the ground; and g) expectations of the State under review in terms of capacity-

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<sup>7</sup> HRC Res 16/21 (25 March 2011) above note 3, Annex paragraphs 15 and 16.

<sup>8</sup> HRC Res. 16/21 (25 March 2011) above note 3 Annex, paragraph 6 and HRC Dec. 17/119 (17 June 2011) above note 3, paragraph 2.



building, and requests, if any, for technical assistance.<sup>9</sup>

Therefore, when a State accepts the recommendations under this mechanism it is agreeing to be assessed on the implementation of those recommendations within a period of four and a half years, and to report on the measures it has undertaken for their realization.<sup>10</sup>

*B. Mutual Admiration Society or understanding human rights implementation beyond naming and shaming?*

The creation of the UPR responded to the criticism of selectivity and the “rising” politicization of the activity of the Commission, a politicization viewed as fatal and the main reason for its elimination and substitution. While the existence of persistent violators of human rights among the members of the organ was denounced by Western, developed democratic States, countries belonging to the Asian Group, African Group and Like Minded Group of States saw “naming and shaming” as the main cause for the dysfunctional status of the Commission.<sup>11</sup> This was made worse by the fact that, in practice, some States were consistently immune from public scrutiny while others were persistently criticised.<sup>12</sup>

On the whole the environment preceding the first cycle of review was in keeping with the co-operative, non-confrontational approach envisaged from the outset of the creation of this procedure. This disappointed many who equated the co-operative approach with “softness”:

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<sup>9</sup> HRC Dec. 17/119 (17 June 2011) paragraph 2.

<sup>10</sup> The periodicity of the review has been extended from four to four and a half years by HRC Res. 16/21, Annex (25 March 2011) and HRC Dec. 17/119 (17 June 2011) both cited above note 3.

<sup>11</sup> Domínguez-Redondo (2007) above note 1.

<sup>12</sup> Miko Lempinen, *The United Nations Commission on Human Rights and the Different Treatment of Governments: An Inseparable Part of Promoting and Encouraging Respect for Human Rights?* (Åbo Akademi University Press, Turku, 2005).

...the UN has little need for another toothless mechanism for “cooperative dialogue.”

We call on Council members to fashion a mechanism that will, in a fair manner, apply real scrutiny, to hold governments to account and cite them for violations and abuses.<sup>13</sup>

The UPR’s alleged deficiencies are regarded as flowing from its perception as a mechanism which is “wholly dependent upon the good will of the state under review” and therefore of little use for “those who are not really willing to participate”.<sup>14</sup> Human Rights non-governmental organizations, UN human rights treaty and Charter-bodies, have been so worried about the potential of the UPR to impact negatively on their work, that some maybe themselves –inadvertently- undermining its positive outcomes. For instance, Frouville does not mince his words when highlighting the flaws of a mechanism that, in addition to penalising cooperative countries, has overshadowed the work of the treaty bodies and of special procedures, depriving them of necessary resources.<sup>15</sup> According to Frouville there is no logic behind the decision to webcast the sessions of the UPR Working Group (consisting of all the members of the Human Rights Council) instead of the meetings of the committees monitoring the compliance of core human rights treaties “during which the good questions are put to the government”.<sup>16</sup> Considering that webcasting the meetings of the UPR was in itself an achievement given the vehement opposition of the African Group and the State

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<sup>13</sup> UN Watch Statement, May 15, 2006 available at <http://www.unwatch.org/site/apps/nl/content2.asp?c=bdKKISNqEmG&b=1330815&ct=2454195&msource=UNHRC&tr=y&auid=1758634>.

<sup>14</sup> Olivier de Frouville, “Building a Universal System for the Protection of Human Rights: The Way Forward”, in M Cherif Bassiouni and William Schabas (eds.) *New Challenges for the UN Human Rights Machinery* (Intersentia, Cambridge, 2011) 241 at 253.

<sup>15</sup> Ibid. at 251.

<sup>16</sup> Ibid. at 252.

members of the Organisation of the Islamic Conference it is surprising that it merits this kind of criticism.<sup>17</sup> The intent here is not to interrogate the rationale behind devoting resources to webcasting the sessions of intergovernmental bodies rather than those of expert committees at different levels. Instead it seeks highlighting the general presumption underlying this criticism: expert bodies are the only ones that can tackle human rights implementation. This general presumption is so entrenched that it is presented as obvious. Frouville tells us the “good questions” are asked by the committees, not by members of the UN Human Rights Council while Nowak, a highly acclaimed scholar and renowned UN expert who has undertaken different UN mandates in an exemplary manner, acknowledges that States take the UPR “more seriously than the State reporting procedure before treaty bodies [but] it suffers from the disadvantages that States’ performance in the field of human rights is assessed by other States rather than by independent experts”.<sup>18</sup> This is linked to a third criticism, that is, that political bodies are inappropriate for dealing with legal questions.<sup>19</sup>

Before assessing the value added to the UN system of promotion and protection of human rights by the UPR, it is important to analyse the rationale of the presumption that legal, expert-based, “hard question”, more confrontational style approaches to human rights implementation are better, and taken to its limit, incompatible with (or undermined and

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<sup>17</sup> Domínguez-Redondo (2008) above note 6 at 733, esp fn 334.

<sup>18</sup> Manfred Nowak, “It’s Time for a World court of Human Rights” in Cherif Bassiouni and William A Schabas (eds.) *New Challenges for the UN Human Rights Machinery* (Intersentia, Cambridge, 2011) 17 at 23.

<sup>19</sup> Frouville (2011) above note 14 at 254. On the politicisation of treaty body recommendations see also, Gareth Sweeney and Yuri Saito, “An NGO Assessment of the New Mechanisms of the UN Human Rights Council” (2009) 9(2) *Hum Rts L Rev* 203 at 210; and Allehone Mulugeta Abebe, “Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council”(2009) 9(1) *Human Rights L Rev* 1 at 19.

compromised by) more cooperative, political mechanisms.<sup>20</sup>

## **Human Rights Implementation: Distinguishing Confrontational and Co-operative Approaches to Human Rights Enforcement**

### *A. Distinction between confrontational and co-operative approaches*

International mechanisms, political strategies or procedures used for the promotion and protection of human rights share the common central objective of prompting domestic authorities to take necessary actions to guarantee enjoyment of internationally recognised human rights within their jurisdiction. International human rights bodies do not have the competence to prosecute and punish those responsible for rights violations or to provide direct redress to victims of such violations. This extends to the international human rights bodies with the sharpest teeth, that is, those with legal competence to issue binding decisions including the European Court of Human Rights,<sup>21</sup> the Inter-American Court of Human Rights<sup>22</sup> and the African Court on Human and Peoples' Rights.<sup>23</sup> This limitation is not unique

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<sup>20</sup> For a challenge to this common presumption from a different perspective to the one used here, see Constance de la Vega & Tamara N Lewis, "Peer Review in the Mix: How the UPR Transforms Human Rights Discourse" in M Cherif Bassiouni and William A Schabas (eds.) *New Challenges for the UN Human Rights Machinery* (Intersentia, Cambridge, 2011) 353, esp at 366-367.

<sup>21</sup> Created by the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, entry into force 1953, 213 UNTS 221, amended by Protocol No. 11, 5 May 1994, CETS No. 155)

<sup>22</sup> Set up in 1979, the Inter-American Court of Human Rights was established by the 1969 American Convention of Human Rights (22 November 1969, 1144 UNTS 123)

<sup>23</sup> While the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples' Rights entered into force in January 2004 [OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (1998)], and the first judges were elected in 2006, the decision to merge this Court with the African Court of Justice has delayed the functioning of this Court [*Protocol on the Statute of the African Court of Justice and*

to international human rights institutions, as the power to execution of decisions dictated by international bodies remains exclusively within the realm of sovereign state competence, due to the lack of a centralized supranational authority to enforce international norms. While the progressive institutionalization of international law through the proliferation of international organizations has implied some delegation of sovereign powers, States remain the principal actors when it comes to enforcing international rules.<sup>24</sup> Even when States decide to bring a dispute to an international court, the judicial body normally settles the dispute without dictating how the final result should be reached at the national level.

The wide range of techniques, strategies and procedures deployed to prompt States to comply with their human rights obligations are commonly classified under the generic rubric of “promotion and protection” of human rights. The dichotomy between co-operation and confrontation to a certain extent mirrors promotion/protection dichotomy. Activities aimed at the promotion or protection of human rights share the common objective of achieving the fulfilment of the obligation to respect human rights. However, this aim is pursued through multiple means which can be broadly categorized under two approaches. The first seeks to achieve this end through support to the State concerned by means of positive incentives such as provision of assistance (co-operative approach). The second aims to do so through the exercise of some form of external pressure or coercion of the state to which the activities are addressed (confrontational approach). When the strategies deployed fall within the second

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*Human Rights* adopted by the Eleventh Ordinary Session of the Assembly, held in Sharm El-Sheikh, Egypt, 1st July 2008].

<sup>24</sup> Related to this discussion is the fragmentation of international law through the proliferation of international judicial standards and institutions. See Rosalyn Higgins, “A Babel of judicial voices?: ruminations from the bench” (2006) 55(4) *Int'l & Comp. LQ* 791; Mathew Craven, “Unity, diversity and the fragmentation of international law” 14 *Finnish Yearbook of Int'l L* 3 (2003). Anastasios Gourgourinis, “The Distinction between Interpretation and Application of Norms in International Adjudication” (2011) 2(1) *J Int'l Disp Settlement* 31.

group, states are not left to act on their own initiative, but are prompted to do so through international pressure, usually following monitoring activities, that may lead to undesirable legal or political consequences. It is useful for methodological and expositive purposes to classify consensual, non-coercive measures as promotional, and those involving external pressure, as protective. In practice, it remains difficult to distinguish activities of protection from other essentially promotional acts such as “technical cooperation”. There are no uniform definitions available, for either the terms “promotion” or “protection” and they are often used interchangeably. In addition, many organs use techniques and procedures mixing approaches either successively or simultaneously because organs that have developed successful promotional activities often claim protective competences.<sup>25</sup>

By their nature, promotional activities do not generally give rise to tensions in relations with the state targeted by such measures. They are also commonly regarded, within the logic of international and diplomatic relations, as the first desirable measures to invoke before engaging in more antagonistic approaches. Nonetheless, those in charge of human rights mechanisms, scholars and practitioners tend to neglect the potential value of cooperative approaches to human rights implementation and focus instead on the confrontational approaches to human rights implementation. As explained in the following section, this is largely due to the legalistic nature (or perception thereof) of human rights.

*B. The Rationale of Confrontational Approaches to Human Rights Implementation. Judicial Fetishism.*

Human rights, as legal claims, have conferred a degree of international legal personality to individuals. They have been constructed as imposing obligations on subjects of international

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<sup>25</sup> Karel Vasak, “Le Droit International des Droits de l’Homme” (1974-IV) 140 RCADI 333, at 360.

law, which consist primarily of States.<sup>26</sup> Because human rights have a normative force, some degree of “penalty” ought to be associated with a failure of compliance, unless we share a view of legal norms that can hardly distinguish between binding and non-binding.<sup>27</sup> In addition, a remedy to the victim ought to follow such a violation according to the general principle of law prescribing that where there is a right there is a remedy (*Ubi jus ibi remedium*).<sup>28</sup> The inclusion of human rights provisions within international law has led human rights defenders, scholars and practitioners to be prone to “judicial fetishism” and too often there is tacit understanding that a norm is not really a norm until articulated by a judicial body.<sup>29</sup> This is linked to the theoretical primitivism of international law in comparison to national law.<sup>30</sup> Justiciability of norms is often made a condition of legal status, and the “perfection” of international law is measured against “more evolved” models of national jurisdictions with centralized judicial, administrative and legal measures of

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<sup>26</sup> For other duty bearers see Andrew Clapham, *Human rights obligations of non-state actors* (Oxford University Press, Oxford 2006); Andrea Bianchi, “The Fight for Inclusion: Non-State Actor and International Law” in Ulrich Fastenrath e.a. (eds.) *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Oxford University Press, New York, 2011) 39.

<sup>27</sup> See William A Schabas “On the Binding Nature of the Findings of the Treaty Bodies” in M Cherif Bassiouni and William A Schabas (eds.) *New Challenges for the UN Human Rights Machinery* (Intersentia, Cambridge, 2011) 97. A critique of the scholarship supporting the idea of norms without legal consequence can be found in Jean d’Aspremont, “Softness in International Law: A Self-Serving Quest for New Legal Materials” (2008) 19(5) EJIL 1075. See also reply to this article by Antony D’Amato (and Rejoinder by Jean d’Aspremont) in (2009) 20 (3) EJIL 897& 911.

<sup>28</sup> Sonja B. Starr, “Rethinking “Effective” Remedies: Remedial Deterrence in International Courts” (2008) 83 NYUL Rev 693 at 698-710. See also Dinah Shelton, “Righting Wrongs: Reparations in the Articles on State Responsibility” (2002) 96(4) AJIL 833.

<sup>29</sup> See Prosper Weil, “Le droit international en quête de son identité. Cours général de droit international public” (1992-VI) 237 RCADI. 41 at 54-57.

<sup>30</sup> See A Campbell “International Law and Primitive Law” (1998) 8(2) Oxford J Legal Stud 169.

enforcement.<sup>31</sup> Following these premises it is often deduced logically that any step to get closer to this more perfect model is desirable.<sup>32</sup> Thus, some believe that the best possible final model for human rights implementation entails the creation of a World Court on Human Rights.<sup>33</sup> Or using Clapham words the creation of such a Court would be the equivalent to arriving in utopia, “simply the logical development of the project to protect human rights through international law.”<sup>34</sup>

Without disregarding the merits of this proposal, present circumstances clearly do not support the creation of such a judicial body. The International Court of Justice has engaged contentious cases linked directly to human rights violations brought by States accepting its jurisdiction.<sup>35</sup> This development is a recent occurrence and has proven to have its limitations. More than highlighting the willingness of States to bring human rights cases to the

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<sup>31</sup> Similarly the status of “authentic” law has been made conditional to the existence of coercive sanctions to respond to any of breach of norms, although many scholars have rejected the sanction-based approaches to law. See Gordon A Christenson “The Jurisprudence of Sanctions in International Law” 31(4) Hum Rts Q 1086 at 1087-9.

<sup>32</sup> Prosper Weil (1992) at 55. See also Francesco Capotorti “Cours général de droit international public” (1994-IV) 248 RCADI 9 esp. at 27-30. For a criticism about a related phenomenon, the “legalization” of international law, see, Jean D’Aspremont “La Doctrine du Droit International Face à la Tentation de la ‘Juridicisation’ sans limites” (2008) 112(4) Revue Générale de Droit International Public 849.

<sup>33</sup> For past and current proposals see Nanette Dumas “Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals” (1990) 13(3) Hastings Int’l & Comp L Rev 585; Manfred Nowak “The Need for a World Court on Human Rights” (2007) 7(1) Hum Rts L Rev 251; also by Nowak (2011) above note 18; McKenzie suggests that the solution depends on national Courts, see John McKenzie, “The Limits of Offshoring-Why the United States Should Keep Enforcement of Human Rights Standards ‘In-House’” (2009) 83(3) Ind L J 1121.

<sup>34</sup> Andrew Clapham, “Overseeing Human Rights Compliance” in Antonio Cassese (ed.) *Realizing Utopia. The Future of International Law* (Oxford University Press, Oxford, 2012) 318 at 323-324.

<sup>35</sup> Rosalyn Higgins, “Human Rights in the International Court of Justice” (2007) 20(4) Leiden Journal of International Law 745; Raymond Goy, *La Cour Internationale de Justice et les Droits de L’homme* (Bruylant, Bruxelles, 2002); William Schabas “Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes” (2007) 15(4) International Studies Journal 17.



International Court of Justice, they seem to show the awareness of some lawyers and judges of the possibilities of jurisdiction created by human rights treaties. As a consequence, disputes only tangentially related to human rights have been put forward to the International Court of Justice.<sup>36</sup> Individuals have direct access to the European Court on Human Rights and indirect access to the Inter-American Court on Human Rights. However, the jurisdiction of the Inter-American Court of Human Rights has not been accepted by all States within the continent most notably, by the United States of America and Canada. It has been necessary to wait until 15 December 2009, for the first ever judgment of the African Court on Human and Peoples' Rights, an inadmissibility decision due to lack of jurisdiction.<sup>37</sup> The treaty-body machinery of the UN with competence to deal with individual cases shows that a large number of states are not willing to grant individuals direct access to these committees, despite their decisions not being legally binding. Although ratifications of the core human rights treaties are rising, in all cases, the number of countries who have ratified the optional protocol or treaty article authorizing the appropriate treaty-body to review individual

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<sup>36</sup> This would be true for the Case Concerning the Application of the Convention of All Forms of Racial Discrimination (Georgia v Russian Federation) (Preliminary Objections) Judgment 1 April 2011 (only available on-line at the time of writing at: <http://www.icj-cij.org>) where the ICJ decided lack of jurisdiction only after having indicated provisional measures in 2008 [Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (Provisional Measures Order) 2008 ICJ Rep 388]. Another 21<sup>st</sup> century case where human rights treaty violations were used as means to access the jurisdiction of the Court more than reflecting the central issue of conflict is the Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Merits), 2005 ICJ Rep 168; Human rights issues are nonetheless central in: Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Merits) 2010 (only available on-line at the time of writing at <http://www.icj-cij.org>); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep 136; and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits), 2007 ICJ Rep 43.

<sup>37</sup> *Michelot Yogogombaye v The Republic of Senegal* (Application No. 001/2008).

complaints filed against the country is significantly lower than the state parties to the treaties.<sup>38</sup>

In brief, for the vast majority of the world there remains no access to international judicial or quasi-judicial bodies competent to address violations of their human rights. This means, in the logic of international law, that the vast majority of the States of the world are not willing to accept such a mechanism. As Opsahl noted twenty years ago “to expect international enforcement is still utopian” and enforcement measures “cannot be the yardstick by which to measure implementation”.<sup>39</sup> The comparison between national and international systems is not possible here, with Opsahl advocating the necessity of a “softer approach” rather than the traditional model of “right-breach-responsibility-process-sanction, leading to punishment of any violator or at least to redress for any victim”.<sup>40</sup> Theories of law enforcement based on these ideas do not provide a solution to the main problem of improving the observance of substantive rights at domestic level.

Nevertheless, the traditional legal approach to human rights violations and the appeal for undesirable consequences for those violating the law is intrinsic to any set of regulations. The fight against impunity is central to any human rights agenda and implies prosecution, redress and punishment. Because the implementation and enforcement machinery of international human rights standards cannot be expected from a centralized, impartial

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<sup>38</sup> By the June 2012, 114 states had ratified the Optional Protocol to ICCPR against the 167 State parties to the ICCPR. The numbers are lower for the other treaty-bodies dealing with communications: 104 States accept CEDAW’s competence (against 187 States Parties); 53 from the CERD (of 175); 64 in the case of CAT (of 150); 66 for CRPD (of 109), 11 for CED (of 32) and 8 for CESCR (of 160).

<sup>39</sup> Torkel Opsahl “Instruments of Implementation of Human Rights” (1989) 10(1-2) Hum Rts L J 13 at 14.

<sup>40</sup> Ibid 31 and 32. On the difference between enforcement and compliance at international and national law level, see also: Oscar Schachter “United Nations Law” (1994) 88(1) AJIL 1 at 14-16.

supranational universal authority, other means of implementation are used by international bodies seeking to put pressure on the State to compel a change of behaviour respectful of human rights standards. The most popular method is the so-called “naming and shaming” strategy (or “mobilization of shame”) seeking to prevent, and punish human rights violators. Other forms of coercive measures on States, such as counter-measures or sanctions, also respond to the logic of remedies and punishments but they present, as we will see in the following paragraphs, their own problems in terms of compatibility with the same standards they intend to protect. The following pages give a brief overview of the main strategies currently used to promote and protect human rights using confrontational approaches.

## **“Naming and Shaming” and Other Confrontational Approaches for the Promotion and Protection of Human Rights**

### *A. Naming and Shaming*

Naming and shaming is one of the primary tools of international human rights bodies. For most of them, their source of power, and where their effectiveness is perceived as resting, lies in the publicity of their actions, that is, on “shaming” those countries and practices identified in their reports and decisions as contrary to international standards. This applies to all human rights bodies with monitoring competences, including Courts with power to issue binding decisions, but with no enforcement powers at the domestic level. The universal and regional human rights regimes created in the aftermath of the Second World War were designed on a model based on the strategy of “naming and shaming” states allegedly violating civil and political rights under their jurisdictions. For decades, this approach kept international human rights mechanisms focused on the promotion and protection of civil and political rights, the fight against impunity and the delimitation of the elements that determine the responsibility

of states for rights violations. Therefore, the human rights machinery has been conceived not so much to provide legal remedies to victims, but rather as “fact-finding tools to expose human rights violations, to unmask those responsible and to prevent future human rights violations.”<sup>41</sup>

The mere existence of a decision by an international body acknowledging the existence of wrongdoing may, in certain cases, serve as a form of punishment and therefore as a potential basis for reparation.<sup>42</sup> In addition, in performing their functions, adjudicatory bodies contribute to the clarification, delimitation, interpretation and further development of human rights standards. However these are secondary outcomes to the main tool most human rights bodies rely on to pursue the promotion and protection of human rights: the mobilization of shame against the concerned State. UN treaty-bodies and charter-bodies use this technique profusely although there is a basic difference between them: States have consented through ratification of the appropriate treaty to be monitored by the committee of experts established by the “core international human rights instruments”,<sup>43</sup> whereas the decision to create charter-bodies mechanisms depends on a collective decision of a political body.<sup>44</sup>

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<sup>41</sup> Manfred Nowak, *Introduction to the International Human Rights Regime*, 268 (Martinus Nijhoff, Leiden, 2003).

<sup>42</sup> See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by GA Res. 60/147 16 December 2005, principle 23. Also, Eric Wyler and Alain Papaux, “The Different Forms of Reparation: Satisfaction” in James Crawford, Alain Pellet & Simon Olleson (eds.) *The Law of International Responsibility* (Oxford University Press, Oxford, 2010) 623 at 631

<sup>43</sup> International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (signed 7 March 1966, entered into force 4 January 1969); International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (signed 16 December 1966, entered into force 3 January 1976); International Covenant on Civil and Political Rights 999 UNTS 171 (signed 16 December 1966, entered into force 23 March 1976); Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (signed 18

It is not only independent experts of international monitoring bodies who rely on “shaming”. Various political bodies engage in putting countries in uncomfortable positions publicly on the basis of their human rights records. The approval of a statement or resolution by the Security Council, the General Assembly or the Human Rights Council deploring the situation of human rights in a particular country, usually requesting specific actions by the State concerned, constitutes the most visible form of naming and shaming, with the hope that public embarrassment will lead to domestic changes and a national policy more respectful towards human rights. Irrespective of the content of any resolution, the approval of a country-specific resolution always represents a strident political step, since it implies condemnation based on the existence of a situation of gross and systematic violation of human rights by a sovereign State against a fellow sovereign State. The appointment of a country mandate to monitor the situation of the State concerned and to publicly report its findings with the further possibility of carrying out visits *in situ* or accepting individual allegations, represents a stronger condemnation with the same strategy, that is, to prompt the State to ameliorate the situation as soon as possible to escape public ignominy. Some authors categorize these resolutions as self-executing acts of international organizations based on the fulfilment of

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December 1979, entered into force 3 September 1981); Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (signed 10 December 1984, entered into force 26 June 1987); Convention on the Rights of the Child 1577 UNTS 3 (signed 20 November 1989, entered into force 2 September 1990); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 2220 UNTS 3 (signed 18 December 1990, entered into force 1 July 2003); Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (signed 13 December 2006, entered into force 3 May 2008); and International Convention for the Protection of All Persons from Enforced Disappearance Doc. A/61/488-C.N. 737.2008.TREATIES-12 (signed 20 December 2006, entered into force 23 December 2010).

<sup>44</sup> For a broader definition of “charter-based” body, see, Victor Condé, *A Handbook of International Human Rights Terminology*, 16 (1999).

their primary objective -condemnation of the state concerned- by their mere adoption and publication.<sup>45</sup> It is possible to argue, in legal terms, that:

...[i]nitiating country-specific action should not be considered an act of confrontation, but rather as a legitimate attempt to place a worrying human rights situation under international scrutiny and through this to enhance respect for human rights.<sup>46</sup>

In other words it is not the narrator, but the violations that ought to be condemned. However the delegation of powers of criticism to independent experts or groups of independent experts are clearly conceived and perceived as confrontational by those at the receiving end of such censure.<sup>47</sup>

States united under the LMG and other states from Asia, Africa and members of the Islamic Conference Organization have repeatedly called for the suppression of “country resolutions” and monitoring mechanisms focused on specific territories, arguing that country condemnation lead to selectivity and double-standards naturally applied by political bodies.<sup>48</sup> Beyond accusations of politicization, interference in domestic affairs, and undue use of hegemonic powers, States opposing country-specific action by the Council support the idea that the “politics of shame” is unsatisfactory as a strategic tool to promote and protect human rights because it is ineffective. Yet this assertion is as difficult to refute as it is to support. Studies attempting to determine the efficiency of shaming countries as a primary tool to

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<sup>45</sup> Ebere Osieke, “The legal validity of ultra vires decisions of International Organizations” (1983) 77(2) AJIL 239 at 252.

<sup>46</sup> Lempinen (2005) above n 12 at 191.

<sup>47</sup> Ibid.

<sup>48</sup> On the different positions of specific States on this see, Elvira Domínguez-Redondo, “Rethinking the Legal Foundations of Control in International Human Rights Law-The Case of Public Special Procedures” (2011) 29(3) NQHR 261 at 274-5.

promote and protect human rights have not led to clear conclusions, and may equally be used to support arguments of countries against such strategies.<sup>49</sup> Other analyses suggest that the impact of naming and shaming on the reputation of states is weaker than conventionally imagined in relation to compliance with international legal obligations, human rights related or not.<sup>50</sup> However, according to a study undertaken by Lebovic and Voeten, the adoption of resolutions by the former UN Commission on Human Rights condemning a country's human rights record resulted in significant reduction (about one-third) in aid received by the targeted country.<sup>51</sup> This study suggests that "shaming" does translate to real sanctions. Taking into account the considerations explained below on the detrimental effect on human rights of sanctions and conditional policies it remains doubtful whether a reduction of aid benefits the situation of human rights in the concerned countries. In other words, though naming and shaming may be a measure with more teeth than normally perceived, it may not necessarily equate to greater compliance with human rights standards.

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<sup>49</sup> Emilie M. Haftner-Burton "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem" (2008) 62(3) *Int'l Org* 689. Ratification of the ICCPR for instance has been associated to a worsening of human rights enjoyment, see Oona A. Hathaway "Do human rights treaties make a difference?" (2002) 111(8) *Yale L J* 1935; Todd Landman, *Protecting Human Rights. A comparative study* (Georgetown University Press, Washington DC, 2005). More sophisticated analysis in recent years suggests that the typology of rights and the cost of producing evidence are relevant factors when measuring impact of ratification of treaties and implementation at domestic level as explored in Yonathan Lupu, *Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements* 4-6 (Draft Paper, October 2011) at: <http://dss.ucsd.edu/~ylupu/Best%20Evidence.pdf>. In line with this more complex view on the impact of human rights treaties' ratification of see also, Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Harvard University, Massachusetts, 2009).

<sup>50</sup> George W. Downs and Michael Jones, "Reputation, Compliance and International Law" 31(1) *Journal of Legal Studies* 95 (2002).

<sup>51</sup> James H. Lebovic and Erik Voeten, "The Cost of Shame: International Organizations and Foreign Aid on the Punishing of Human Rights Violators" (2009) 46(1) *Journal of Peace Research* 79.

The arguments against naming and shaming strategies are not confined to a group of States. Referring to the prime method used by human rights NGOs, that is, the exercise of pressure to achieve “mobilization of shame”, Uvin describes this strategy as “confrontational, arm-twisting, [and] threat-based”.<sup>52</sup> The possibility of false accusations has led some academics to highlight the risks of naming and shaming strategies.<sup>53</sup> Exacerbating the artificial distinction between civil and political rights and economic, social and cultural rights, Ken Roth, Executive Director of Human Rights Watch, has argued that shaming strategies are not the most suitable to deal with violations of economic, social and cultural rights. This ostensibly justifies NGOs such as Human Rights Watch, whose methodology relies primarily on investigating, exposing and shaming, and is not concerned with addressing violations of economic, social and cultural rights involving issues of distributive justice, unless discriminatory or arbitrary governmental conduct can be identified.<sup>54</sup>

*B. Other confrontational approaches: Retortion, Counter-Measures, Conditionalities and Sanctions*

The most common strategy through which to pressurize states to fulfil their human rights obligations remains the act of revealing the violations occurring within its jurisdiction. Other international mechanisms of enforcement that have been tried to a lesser degree, include retortion, counter-measures, conditionalities and sanctions. It is beyond the scope of this

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<sup>52</sup> Peter Uvin, *Human Rights and Development* (Kumarian Press, Bloomfield, CT, 2004), 57.

<sup>53</sup> See Therese O'Donnell, “Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)” (2006) 17(5) EJIL 945; and Elad Peled, “Should States have a right to reputation? Applying the rationale of defamation law to the international area” (2010) 35(1) Brook. J Int'l L 107.

<sup>54</sup> See Kenneth Roth “Defending Economic, Social and Cultural Rights: Practical Issues Faced by and International Human Rights Organization” (2004) 26(1) Hum Rts Q 63. Responding to this and advocating effective “naming and shaming” methodologies see Leonard S. Rubenstein “How International Human Rights Organizations Can Advance Economic, Social and Cultural Rights” (2004) 26(4) Hum Rts Q 846.



paper to unravel the complexity of each of these concepts and to explain in detail how they have been used. However, it is worth introducing a brief reminder of the main difficulties met by States and intergovernmental actors when faced with the decision to use such mechanisms to impose human rights compliance.

States and -to the extent their competences allow it- intergovernmental organizations can use coercive measures to impose human rights compliance on other States. With the clear limit of the prohibition of the use of force, and given that the international community does not have a centralized enforcement mechanism, States may respond unilaterally or collectively to breaches of international law, unless they have expressly delegated part of this competence to an international organ. When the response to a breach of international norms is taken by an international organization they are called “sanctions” instead of “counter-measures”.<sup>55</sup> Counter-measures imply the breach of an international obligation as a response to another breach, and therefore are conceived as circumstances precluding the wrongfulness of conduct that would otherwise raise international responsibility of the State.<sup>56</sup> Conversely, acts of retortion are hostile responses to another States’ lawful or unlawful actions, not implying in themselves a breach of international law. The expulsion of diplomatic

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<sup>55</sup> James Crawford, “The Relationship between Sanctions and Countermeasures” in Vera Gowlland-Debbas (ed.) *United Nations Sanctions and International Law* (Kluwer International, The Hague, 2001) 57. See also Georges M. Abi-Saab, “De la sanction en droit international. Essai de clarification” in Jerzy Makarczyk (ed.) *Theory of International Law ant the Threshold of the 21<sup>st</sup> Century. Essays in honour of Krzysztof Skubiszewski*, (Kluwer International, The Hague, 1996 ) 61.

<sup>56</sup> International Law Commission (ILC), *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, p 43, UN Doc A/56/10 (2001), articles 22-26.

representatives, denial of visas to nationals of the State concerned, and/or the termination of economic agreements fit into this category.<sup>57</sup>

Since at least some human rights obligations are generally understood as *erga omnes*,<sup>58</sup> or “solidarity obligations”, where obligations such as those relating to human rights are breached, the entire international community of States would be entitled to invoke international responsibility of the State concerned.<sup>59</sup>

Attempting to use traditional decentralized inter-state coercive measures to compel respect for human rights is difficult to reconcile with the enforcement of human rights standards. First, human rights violations cannot be used as a counter-measure themselves, and therefore it is not possible to justify the violation of human rights as a legitimate response to a breach of human rights by another State.<sup>60</sup> Second, the enforcement of counter-measures tends to inflict further suffering on those who the measures intend to protect. This problem is

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<sup>57</sup> Lori F Damrosch, “Enforcing International Law Through Non-Frangible Measures” (1997-III) 269 RCADI 9 at 91-99.

<sup>58</sup> The terminology as such was introduced as an *obiter dictum* by the ICJ in the *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Merits)* [1970] ICJ Reports 3, paragraph 33. The ICJ has applied the concept in other cases since. See Karl Zemanek, “New Trends in the Enforcement of *erga omnes* obligations”, 4 Max Planck UNYB 1, 10-12 (2004) ; see also Sandesh Sivakumaran, “Impact on the Structures of International Obligations” in Menno T Kamminga and Martin Scheinin (eds.) *The Impact of Human Rights Law on General International Law* (Oxford University Press, Oxford, 2009)133.

<sup>59</sup> On the conceptual difficulties attached to the term “obligation *erga omnes*” and its application, see Shabtai Rosenne, “Some Reflections *Erga Omnes*” in Anthony Anghie & Garry Sturgess (eds.) *Legal Visions of the 21<sup>st</sup> Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer International, The Hague, 1998) 509; Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford University Press, Oxford, 1997); Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, Cambridge, 2009)

<sup>60</sup> ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, p 43, UN Doc A/56/10 (2001), Commentaries to Chapter II (Countermeasures) at p. 129, paragraph 5.

shared with centralized imposition of coercive measures by intergovernmental bodies (sanctions). Comprehensive sanctions are particularly problematic since they constitute a form of collective punishment and do not comply with the ethical principle of individual responsibility.<sup>61</sup> In addition there is much evidence to question their effectiveness.<sup>62</sup> A cross-national empirical analysis for the period 1981-2000 published in 2009, concluded that “economic sanctions deteriorate citizens’ physical integrity rights”,<sup>63</sup> with others suggesting that this is particularly true when sanctions are directed against dictatorships.<sup>64</sup> In conclusion,

...sanctions all too often are a poor alibi for, not a sound supplement to, a good foreign policy. They are ineffective, counter-productive, harmful to the economic interests of those imposing sanctions, damaging to relations with allies, morally questionable, yet difficult to lift once imposed.<sup>65</sup>

UN human rights bodies do not engage in the use of conditional policies with the declared objective of prompting human rights compliance and this is therefore outside the scope of this

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<sup>61</sup> Hans Köchler, *Ethical Aspects of Sanctions in International Law. The Practice of the Sanctions Policy and Human Rights*, International Progress Organization (I.P.O.) Research Papers (1994) available at <http://i-p-o.org/sanctp.htm>.

<sup>62</sup> A striking example reporting the failings of the sanctions imposed to Angola has been documented by the UN itself, see Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA included in *Letter* UN doc. S/2000/2003, 10 March 2000.

<sup>63</sup> Dursun Peksen, “Better or Worse? The Effect of Economic Sanctions on Human Rights” (2009) 46 (1) *Journal of Peace Research*, 59. See also Mohamed Bennouna, “Les sanctions économiques des Nations Unies” (2002-I) 200 RCADI 9 esp. 40-47.

<sup>64</sup> Cristiane Careniero and Dominique Elden, “Economic Sanctions, Leadership survival and human rights” (2009) 30(3) *U Pa J Int’l L* 969.

<sup>65</sup> Ramesh Thakur, *The United Nations, Peace and Security. From Collective Security to the Responsibility to Protect* (Cambridge University Press, Cambridge, 2006) at 135, see especially pp. 134-155; and Alexander Orakhelashvili, *Collective Security* (Oxford University Press, Oxford, 2011) at 188-220, in particular the summary of the humanitarian disaster inflicted by the comprehensive economic sanctions against Iraq, Former Yugoslavia and Haiti at 204-210

article. It is nonetheless worth emphasizing that this political tool is often used in articulating concepts of development and human rights; conditional cash transfers programmes aiming at alleviating poverty have been an issue under focus by the HRC Special Rapporteur on extreme poverty who has concluded that conditionalities may undermine the autonomy of beneficiaries, reinforce stereotypes linked to gender and to persons living in poverty as incapable of responsible decision-making.<sup>66</sup> Large numbers of developing States united under the “Group of 77” and other political alliances such as the LMG, are opposed to coercive approaches imposing political and economic conditionality attached to compliance with civil and political rights.<sup>67</sup> This view is widely shared by commentators and human rights advocates from the North and South, who use similar arguments as those directed against the use of sanctions to improve human rights situations. Political conditionality is predominantly perceived as unethical, ineffective, and counterproductive, as well as impossible to implement.<sup>68</sup> Particularly, conditionality clauses often come at the expense of economic, social and cultural rights, thus introducing a further schism in the indivisibility of the human rights agenda.<sup>69</sup>

### **Assessment of the Added Value and Potential of the Universal Periodic Review**

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<sup>66</sup> See report of the Special Rapporteur on the question of human rights extreme poverty, Magdalena Sepúlveda Carmona, UN doc. A/66/265, 4 August 2011, paragraphs 53-57; Compared to previous reports, the position of the Special Rapporteurs has become more critical with this kind of programmes, see UN doc. A/HRC/11/9, 27 March 2009.

<sup>67</sup> See for instance the *Declaration of the South Summit* adopted by the member countries of the Group of 77 and China during the first South Summit celebrated in Cuba, April 10-14, 2000, paragraph 21, available at [http://www.g77.org/summit/Declaration\\_G77Summit.htm](http://www.g77.org/summit/Declaration_G77Summit.htm).

<sup>68</sup> Peter Uvin, *Human Rights and Development* (Kumarian Press, Bloomfield, CT, 2004) at 54-82.

<sup>69</sup> Chaloka Beyani, “The Legal Premises of the International Protection of Human Rights” in Guy S Goodwin-Gill & Stefan Talmon (eds) *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press, Oxford, 1999) 21 at 22 .

On 13 October 2011 the first cycle of the UPR mechanism was completed. It was incontestably an overwhelming and unprecedented success in terms of State engagement with a human rights review process. All 192 States participated in the review with ninety eight per cent presenting a written national report<sup>70</sup> and eighty per cent choosing to be represented at ministerial level during the process.<sup>71</sup> The principles underpinning the creation of the UPR are clearly stated in the resolutions creating the mechanism: objectivity, transparency, non-selectivity, constructive dialogue, and non-confrontation.<sup>72</sup>

Beyond the confidential and little known space occupied by the complaint mechanism (former 1503 procedure),<sup>73</sup> the UN human rights machinery is based largely on confrontational, naming and shaming mechanisms that, as explained earlier, may have more teeth than believed. The UPR has opened an alternative forum to take stock of the situation of human rights situations around the globe. Governed by principles of universality, dialogue between equals and co-operation, States have engaged with the process without exception.

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<sup>70</sup> States can submit an oral or written report, but only Cape Verde, reviewed during the 3<sup>rd</sup> session on 10 December 2008 and Comoros, reviewed during the 5<sup>th</sup> session on 13 May 2009, did not provide a written report during the first cycle. Nonetheless the oral statement addressing the human rights situation in Cape Verde submitted by the government has been praised for its honesty and comprehensiveness. See, International Service for Human Rights (ISHR), *Universal Periodic Review, 3<sup>rd</sup> Session Cape Verde (Final) Reviewed on 10 December 2008*, UPR Monitor, December 2008, p. 2. The oral presentation by Comoros has also been considered self-critical, ISHR, *Comoros Reviewed by the UPR*, Friday 04 September 2009.

<sup>71</sup> The details of the composition of each delegation is also reflected in the report of the Working Group on the UPR. For the total numbers, see UPR-Info, *UPR Info organises celebration of the UPR 1<sup>st</sup> cycle*. Friday 21 October 2011, at <http://www.upr-info.org/+UPR-Info-organises-celebration-of+.html>. On the participation of States taking the floor to comment on another State's review, see: UPR-Info, *Analytical Assessment of the UPR, 2008-2010*, 8 (May 2010) at [http://www.upr-info.org/IMG/pdf/UPR-Info\\_Analytical\\_assessment\\_of\\_the\\_UPR\\_2008-2010\\_05-10-2010.pdf](http://www.upr-info.org/IMG/pdf/UPR-Info_Analytical_assessment_of_the_UPR_2008-2010_05-10-2010.pdf).

<sup>72</sup> HRC Res. 5/1, paragraphs 3 (a)(d)(g)(k) and 6.

<sup>73</sup> Elvira Domínguez-Redondo, *La Comisión de Derechos Humanos a Debate: el procedimiento 1503* [Future of the UN Commission on Human Rights: the 1503 procedure] 2 *Revista Iberoamericana de Derechos Humanos*, 34 (2006).

From the first session in 2008, the interactive dialogue has provided a holistic approach to social, economic, cultural, civil, political rights, development, vulnerable groups, human rights defenders, and gender, including the question of sexual orientation. Respect for human rights standards while countering terrorism, State responsibility for activities of its armed forces overseas, the issue of “extraordinary renditions” and questions about secret places of detention or non-ratification by Western European States of the Convention on Migrant Workers have been all raised.<sup>74</sup>

Contrary to expectations the UPR does not replicate the modus operandi of expert mechanisms already operating by the dozen under the umbrella of the Organization.<sup>75</sup> From the practice followed so far, it seems that very important positive outcomes can be gauged from the existence of the UPR.<sup>76</sup> Among those, two are particularly important, firstly, the existence of the compilations of human rights information at country-level that can be used as the basis of follow-up for improving human rights in every State. Secondly, the potential of the UPR to contribute to the sources of international human rights.

#### *A. Compiling human rights information at country level*

The recommendations and conclusions of special procedures mandate-holders and treaty-bodies were broadly used as a basis for the questions and comments made during the interactive dialogue. This probably constitutes the first time human rights mechanisms

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<sup>74</sup> The statistical data available indicates that the five most frequent issues were women’s rights, rights of the child, justice, and torture and other cruel, inhuman or degrading treatment, UPR-Info (2010) above n 70.

<sup>75</sup> Nadia Bernaz, “Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism” Kevin Boyle (ed.) in *New Institutions for Human Rights Protection* (Oxford University Press, Oxford) 75, 79-82.

<sup>76</sup> See Domínguez-Redondo (2008) above note 6 at 733-4. For an NGO perspective, see Human Rights Watch *Report, Curing the Selectivity Syndrome. Enhancing the Universal Periodic Review*, 4 (June 2010), available at <http://www.hrw.org/en/node/91074/section/5>. The potential of the UPR to address discrimination based on gender has been highlighted in Jeremy Sarkin, “How to better Infuse Gender into the Human Rights Council’s Universal Periodic Review Process” (2011) 2(1) *Jindal Global Law Review* 172.

operating under the umbrella of the UN were used as effective informers of the situation of human rights in a given country in a concerted and consolidated manner. This also reveals what has been known for a long time: that the recommendations and conclusions drafted by some conventional and non-conventional mechanisms of the system are inadequate in assessing the situation of human rights of a given country.<sup>77</sup> This process will certainly force human rights mechanisms to elaborate conclusions and recommendations that are useful for others stakeholders to review in future. Further research, outside the intended scope of these pages, is needed to assert which special procedures mandate-holders, treaty-body mechanism, NGO reports, and/or any other source of information used as a basis of the review seem to be the most useful, at least in terms of those most used to evaluate human rights situations in the context of the UPR. It remains too early to evaluate the full impact of the UPR, but it has shown potential for providing a political forum for following-up treaty-bodies' and charter-bodies' activities and recommendations. Thus treaty bodies and special procedures may need to tailor their reporting and be more specific in their recommendations and conclusions if the UPR provides follow-up on their work.

The fact that the UPR has forced NGOs and the OHCHR to compile information on human rights at country-level is by itself an unprecedented success on the grounds of the potential value of that information.<sup>78</sup> Whether acknowledged expressly or not, prior to the

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<sup>77</sup> Treaty-bodies recognize that "concluding observations should be streamlined, strengthened and prioritized and that the recommendations should be concise and formulated in a precise manner appropriate to the matter at hand in order to facilitate follow-up and implementation issue concise recommendations", See report of the Inter-Committee Meeting working group on follow-up (12 to 14 January 2011), UN doc. HRI/ICM/2011/3-HRI/MC/2011/2, 4 May 2011, paragraph 34. On the need to formulate concise and prioritised recommendations by mandate-holders of special procedures, see Report of the Open-Ended Seminar on Enhancing and Strengthening the Effectiveness of the Special procedures of the Commission on Human Rights, UN doc. E/CN.4/2006/116, (12 December 2005) paragraphs 41-55.

<sup>78</sup> Constance de la Vega & Tamara N Lewis (2011) above note 20 at 368-369.

establishment of the UPR and the OHCHR compilation of information by country, every study evaluating human rights situations at country-level, including the effectiveness of international human rights mechanisms, relied on two main data sources: the US Department of State Human Rights Reports, and Amnesty International Annual Reports.<sup>79</sup> To understand the relevance of the compilation of information on human rights at country-level, it is pertinent to recall that in the 2004 report *A More Secure World: Our Shared Responsibility*, the Secretary-General's High-Level Panel on Threats, Challenges and Change, recommended that the High Commissioner prepare an annual report on the situation of human rights worldwide, to serve as the basis for a comprehensive discussion with the then Commission (now Council).<sup>80</sup> The report would have needed to focus on the implementation of all human rights in all countries, based on information stemming from the work of treaty bodies, special mechanisms and any other sources deemed appropriate by the High Commissioner.<sup>81</sup> The High Commissioner responded timidly to this request in her Plan of Action submitted as an addendum to the Secretary-General's *In Larger Freedom* Report, stating that it was essential that a fair and transparent method was developed to compile information upon which to base the new peer review mechanism without elaborating further.<sup>82</sup> In practice, the OHCHR has published a compilation of the UN human rights documents on a country by country basis on its Website, under the title "Human Rights in the World" avoiding analysis or assessments

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<sup>79</sup> The U.S. Department of State Human Rights Reports are available at <http://www.state.gov/g/drl/rls/hrrpt/> and Annual Human Rights Reports published by Amnesty International can be downloaded from <http://www.amnesty.org>.

<sup>80</sup> UN doc. A/59/565, December 2004, paragraph 288.

<sup>81</sup> *Ibid.*

<sup>82</sup> *The OHCHR Plan of Action: Protection and Empowerment*, UN doc. A/59/565/Add.3, Annex, Geneva-May, 2005.



over the meaning of that information.<sup>83</sup> The compilation includes information on the status of ratifications of human rights treaties, reporting status, open invitations issued to special procedures, voluntary pledges and commitments made by the State to support their candidacy as members of the HRC, documents resulting from the UPR process and other human rights related documents published by external bodies such as national human rights institutions or specialised UN agencies.

The compilation of the work of UN human rights bodies as the basis for the UPR has provided an unprecedented opportunity to follow-up the implementation of their conclusion and recommendations. Those familiar with proposals made in the past aimed at reinforcing the competence of the former Commission on Human Rights to follow-up the work of its subsidiary organs know that those proposals have been effectively blocked by Asian and African States and that by itself this compilation signals an unprecedented success for the UN human rights machinery. For years some proposals were tabled to allow the adoption of decisions by the defunct Commission, its subsidiary organs, or the Office of the High Commissioner of Human Rights regarding the lack of governmental cooperation with human rights treaty-bodies. Until now, lack of political will has prevented any of these initiatives from prospering.<sup>84</sup> It is worth recalling the fate of a far less ambitious initiative advanced to highlight observations or recommendations on the issue of follow-up on prior recommendations; and to name non-cooperating countries in executive summaries that precede the reports of mandate-holders of public special procedures since 2000.<sup>85</sup>

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<sup>83</sup> See OHCHR Website at: <http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx>.

<sup>84</sup> See Elvira Domínguez-Redondo, *Los Procedimientos Públicos Especiales de la Comisión de Derechos Humanos de Naciones Unidas* (Tirant lo Blanch, Valencia, 2005) at 303-307.

<sup>85</sup> The recommendation to include non-cooperating governments was included in the report *Rationalization of the Work of the Commission*. Report of the Bureau of the fifty-fourth session of the Commission on Human

Governmental opposition to this proposal was strong enough to remove it from those approved in the reform process undertaken by the Commission on Human Rights between 1998 and 2000.<sup>86</sup> The systematic compilation of information on a geographic basis would not only facilitate follow-up of the implementations of recommendations by UN governmental and expert human rights bodies, but also by other stakeholders such as human rights NGOs and national human rights institutions. It should also serve to improve the quality and capacity of the OHCHR to provide technical assistance. It is well within the realm of possibilities that this first ever country-specific human rights database generated by the Office of the High Commissioner will have a positive impact on its monitoring, information-collection and public education and training capacities. Finally, the problems of availability of human rights information produced by the UN itself as a factor contributing to the mismanagement of peacekeeping operations should also improve.<sup>87</sup>

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Rights submitted pursuant Commission Decision 1998/112 (the so-called Selebi Report), UN doc. E/CN.4/1999/104 (23 December 1998) paragraph 47, Recommendation 8 c) and d).

<sup>86</sup> The opposition to this proposal comes from the same countries opposing any country specific action by the then Commission on Human Rights, now Human Rights Council. See *Comments, observations and alternate recommendations on the report of the Bureau of the 54<sup>th</sup> session of the Commission on Human Rights, submitted pursuant to Commission on Human Rights decision 1998/112 (E/CN.4/1999/104), presented by the delegations of Algeria, Bhutan, China, Cuba, Egypt, India, the Islamic Republic of Iran, Malaysia, Myanmar, Nepal, Pakistan, Sri Lanka, the Sudan and Vietnam*, UN doc. E/CN.4/1999/WG.19/2 (18 August 1999) paragraph 72. The position of the Asian Group on this issue against the adoption of the measure can be found in UN doc. E/CN.4/1999/WG.19/3 (18 August 1999) paragraph 20. For the decision of including executive summaries in special procedures reports, announced by the Chairman of the Commission during its fifty-fifth session, see *Report on the fifty-fifth session of the Commission on Human Rights (22 March-30 April 1999)* UN doc. E/CN.4/1999/167-E/1999/23 (20 July 1999) paragraph 552. See also UN docs. E/CN.4/2000/112 *Rationalization of the work of the Commission on Human Rights* (16 February 2000) paragraphs 29 and 32; and E/CN.4/2003/118 and Corr.1, *Organization of the work of the Commission on Human Rights. Enhancement of the working methods of the Commission*, heading 3 (documentation, 6 May 2003).

<sup>87</sup> Elvira Domínguez-Redondo, "Making the Connection: Security and Human Rights" in M Cherif Bassiouni and William Schabas (eds.) *New Challenges of the Human Rights Machinery* (Intersentia, Cambridge, 2011) 267.

As explained in the next section, there is already a database of UPR recommendations containing indicators of its impact on the enjoyment of human rights at national level. This highlights the unprecedented value of the information gathered through the UPR process.

### *B. Indicators of Impact on Human Rights Implementation*

A second positive outcome of the UPR process that this article seeks to draw attention to is the potential value of the commitment of countries to human rights as a result of engaging with the mechanism. If the next cycles of the UPR do not change the dynamics established during the first cycle (one hundred per cent participation at very high governmental level) the national reports on the situation of human rights in the country would be excellent and unprecedented primary sources to gauge the State's *opinion juris* on human rights.<sup>88</sup> The first UPR cycle's balance is extremely positive here. Notwithstanding the cultural relativism debate and independent of poor human rights records, States have not denied the concept of human rights as such, nor have they undermined the legitimacy and practice of other human rights bodies, on which they have relied in compiling their review.

Conclusions of preliminary research testing the effectiveness of the UPR based on the analysis and scoring of implementation actions of governments in response to their accepted UPR recommendations, suggest that the UPR process is worth investing in. About 68 per cent of the 10,262 recommendations made in the first seven sessions of the UPR were accepted by States, 13 per cent were rejected and 19 per cent received an unclear response, or were still

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<sup>88</sup> Roger Lloret-Blackburn, *Cultural Relativism in the Universal Periodic Review of the Human Rights Council*, ICIP WORKING PAPERS 2011/03, Barcelona: Institut Català per la Pau, September 2011, available at [www.icpt.cat](http://www.icpt.cat), at 14 and 36.

pending according to the database on recommendations developed by the NGO UPR-Info.<sup>89</sup>

The early results of research measuring the impact of the UPR on the enjoyment of human rights at national level are even more striking. David Frazier has developed a model to measure such impact awarding scores to countries based on whether individual recommendations had been fully, partially or not implemented. Scores for each recommendation were averaged into a value the author labels Accepted Recommendation Implementation (ARIS).<sup>90</sup> The main conclusions provide reason for optimism:

The UPR has helped encourage countries of all development levels to act to protect human rights. In addition, the more developed countries have been far better at implementing a higher percentage of their recommendations, as shown in this paper by correspondingly high ARIS values.<sup>91</sup>

David Frazier considers that the success of the UPR is based on its “naming and shaming” effect.<sup>92</sup> While the existence of a residual name and shame dimension cannot be discarded as a contributing factor to the perceived responsiveness of states to the UPR recommendations, it is suggested that the grounding of the mechanism on the principle of cooperation and peer review and the corresponding spirit with which many of those states adverse to confrontational mechanisms have engaged with the UPR process has played an important role

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<sup>89</sup> For the summary on the first seven sessions see UPR-Info (2010) above note 70. The database of UPR recommendations, classified in 5 categories, is available at UPR-Info at <http://www.upr-info.org/database/>

<sup>90</sup> David Frazier, *Evaluating the Implementation of UPR Recommendations: A Quantitative Analysis of the Implementation Efforts of Nine UN Member States*, Working Paper, August 2011, available at UPR-Info Website, <http://www.upr-info.org/-Articles-and-analyses-.html>, at 3. For other early evidence of positive outcomes of the UPR, see Rachel Brett, “A Curate’s Egg. UN Human Rights Council: year 3. 19 June 2008 to 18 June 2009”, Human Rights and Refugees Publications. Quaker United Nations Office, 11 (August 2009) at <http://www.guno.org/geneva/pdf/humanrights/ACuratesEgg200908.pdf>.

<sup>91</sup> Frazier (2011) above note 89 at 3.

<sup>92</sup> *Ibid.*

in contributing to the implementation of recommendations emerging from it.<sup>93</sup>

### *C. Reinforcement of International Human Rights Obligations*

Having only completed its first cycle, it would be premature to present a theory on the impact of the UPR on the sources of international human rights norms. However, the outcomes so far suggest that contrary to the fears articulated by sceptics, the UPR could contribute to reinforcing rather than debilitating existing human rights obligations. Because States can accept or reject recommendations made in the context of the UPR process some commentators feared that States would undermine human rights obligations by rejecting recommendations which corresponded to their conventional obligations.<sup>94</sup>

This fear has proved ill-founded. First of all, it seems to contradict the practice of States to date, which would appear to be more in line with using the UPR as a form of interim follow-up of treaty body recommendations than a backdoor for contradicting them,<sup>95</sup>

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<sup>93</sup> From a non-legal perspective, Mathew Davies makes a very interesting case for what the UPR represents in terms of shifting from strategies based solely on public opprobrium to more persuasion-based efforts. The author believes this could lead towards significant depoliticisation of the UN human rights machinery, see: Mathew Davis, "Rethorical Inaction? Compliance and the Human Rights Council of the United Nations" 25 *Alternatives: Global, Local, Political* (2010) 449.

<sup>94</sup> Nowak (2011) above note 18 at 24 and Frouville (2011) above note 14 at 254. Also, *Report of the chairpersons of the human rights treaty bodies on their twentieth meeting*, UN doc. A/63/280 (2008) paragraph 22.

<sup>95</sup> Michael O'Flaherty and Pei-Lun Tsai, "Periodic Reporting: The Back bone of the UN Treaty Body Review Procedures" in M Cherif Bassiouni and William Schabas (eds.) *New Challenges for the UN Human Rights Machinery* (Intersentia, Cambridge, 2011) 37 at 49. See also Constance de la Vega & Tamara N Lewis (2011) above note 20 at 372-373.

although different interpretation may be inferred from this lack of contradiction.<sup>96</sup> More importantly, a rejection by a State of a recommendation resulting from the UPR cannot legally be construed as undermining a conventional obligation of the State. The terms of article 42.2 of the Vienna Convention on the Law of Treaties could not be clearer:

The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty<sup>97</sup>

The Human Rights Committee has held that, in the absence of provisions regarding their termination, denunciation or withdrawals, treaties codifying universal human rights are protected against unilateral acts of States aimed at their denunciation according to the provisions laid out in articles 54 and subsequent articles of the Vienna Convention on the Law of Treaties, which are generally accepted as reflecting customary law.<sup>98</sup> Resource to this argumentation is however unnecessary as the rejection of a recommendation in the Human Rights Council cannot be interpreted as fulfilling the requirements for withdrawing from conventional obligations as regulated by the law of treaties. In addition to the plain wording of the provisions of the Vienna Convention on the Law of Treaties, the rationale of the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic*

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<sup>96</sup> See Rhona K M Smith, "More of the Same or Something Different? Preliminary Observations on the Contribution of the Universal Periodic Review with Reference to the Chinese Experience" (2011) 10(3) Chi. J. Int'l L 565 at 582-583.

<sup>97</sup> UN Vienna Convention on the Law of Treaties 1155 UNTS 331 (signed 23 May 1969, entered into force 27 January 1980) article 42.2. The methods available to terminate and suspend treaties are regulated in articles 54-72.

<sup>98</sup> UN Human Rights Committee, *General Comment No. 26: Continuity of obligations*, UN doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, UN doc. A/53/40, Annex VII. On the topic of treaties that are unlikely to be capable of withdrawal, see Anthony Aust, "Treaties, Termination" in Rüdiger Wolfrum (dir.) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2012) Vol. X, 17 at 19-20.

*Republic of Congo v Rwanda*) holding that in order to have legal effect in international law, the withdrawal of a reservation to a treaty is subject to the legal regime established for their notification at international level, is applicable *mutatis mutandis* here.<sup>99</sup>

The rejection of a recommendation relating to pre-existing binding obligation should not be interpreted as undermining legal obligations, but rather as means by which States can withhold their consent to the nature of the monitoring of those obligations under the UPR. As explained elsewhere, the consent required to be bound by a treaty is different from the consent needed to endow an international organ with power to monitor compliance of that treaty or any other international legal norm.<sup>100</sup> If a State rejects a recommendation made by another State in the context of the UPR this does not mean, in legal terms, that it is not legally bound by that obligation, nor does it imply that the State concerned is trying to weaken its commitment towards a particular human right norm. It is asserting its reluctance to be monitored by the UPR on the implementation of such a recommendation during its next review.<sup>101</sup>

Conversely, if the process itself does not lead to engagement fatigue, and if governments maintain first cycle trends of close to one hundred per cent participation, involving the highest level of governmental representation, the UPR could offer evidence of *opinio juris* thereby accelerating the formation of new customary law and consolidating existing customary standards. The Human Rights Council clearly fits the category of a body with the capacity to produce such a result, particularly if we accept a conception of customary

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<sup>99</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda) (Jurisdiction and Admissibility)* [2006] ICJ Rep 1 at paragraphs 41-43.

<sup>100</sup> Elvira Domínguez-Redondo (2011) above note 47 at 285.

<sup>101</sup> Although States have rejected recommendations on the basis that they do not concern universally recognised human rights principles mainly regarding sexual discrimination and sexual orientation rights. See, Rosa Freedman, "New Mechanisms of the UN Human Rights Council" (2011) 29 (3) NQHR 289 at 310.

law where clear evidence of *opinio juris* minimises the need for consistent State practice. In the words of Brian Lepard:

Where states believe that a particular norm should be recognized as legally authoritative because states have made universal promises to all other states to behave in the way called for by the norm, the evidentiary role of state practice should also be minimized. This is because states themselves believe that the promise of certain behaviour –whether or not states already engage in that behaviour- is the reason to make it obligatory.<sup>102</sup>

The acceptance of recommendations at ministerial level in an intergovernmental forum could also be construed as a unilateral act of State, and therefore capable of creating autonomous sources of obligations according to the International Court of Justice in the *Nuclear Treat Case (Australia v France)*.<sup>103</sup> In this case the Court gave particular importance to the fact that the French statements were made “publicly and *erga omnes*” and through them, its intention was “conveyed to the world at large”.<sup>104</sup>

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<sup>102</sup> Brian D Lepard, *Customary International Law. A New Theory with Practical Applications* (Cambridge University Press, New York, 2010) at 124; see also literature review case-law summary supporting this view at 122-139. On the concept of *opinio juris* see, Anthony A D’Amato, *The Concept of Custom in International Law* (Cornel University Press, London, 1971) 89-90; also Bruno Simma and Philip Alston, *The Sources of Human Rights Law, Jus Cogens and General Principles*, Austl. Y.B. Int’l L. 82 (1988-9). Some deny value to the *opinio juris* element in its traditional conception; see Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, New York, 2005) 23-43.

<sup>103</sup> *Nuclear Test Case (Australia v France)(Merits)* [1974] ICJ Rep 253, paragraph 43. See the definition of unilateral act formulated by the International Law Commission (ILC, *Unilateral Acts of States: Report of the Working Group: Conclusions of the International Law Commission Relating to Unilateral Acts of States*)

<sup>104</sup> *Ibid*, paragraphs 50-51. The International Law Commission maintained these criteria in its *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations* (ILC 58<sup>th</sup> session, 2006). See also *Case Concerning the Frontier Dispute (Burkina Faso v Mali) (Merits)* [1986] ICJ Rep 573, paragraphs 39 and 40 and *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, paragraphs 59 and 60. See, Victor



## CONCLUSION

The politicisation of human rights at inter-governmental level, especially in response to naming and shaming, has been a constant threat to the United Nations rights-based edifice. The objections of States to this modus-operandi of some human rights mechanisms contributed to their ineffectiveness in the past, and also contributed to the demise of the Commission. The new Human Rights Council's UPR mechanism was viewed with a degree of pessimism by human rights activists and academics, who felt that as a peer review mechanism it was likely to be "soft" on states. States engaged with the UPR wholeheartedly, viewing it as non-confrontational and relying on existing human rights information to form the basis for review. Their engagement displayed two prominent features in the first review cycle: one hundred per cent engagement (possibly the first time a human rights mechanism has resulted in universal engagement); and a high degree of ministerial level participation.

The impact of this phenomenon has meant that the human rights record of every state has been scrutinised, creating a body of information on states' human rights compliance that is unprecedented, not only for its thoroughness, but also because it draws on a variety of sources including ministerial level articulations. The ultimate value of the process can be gauged through the creation of a strong data set on human rights information on a country-by-country basis. More importantly, the engagement of States in the process can be said to have provided concerted evidence of *opinio juris*, thereby substantiating and consolidating human rights standards. UPR commitments can also be construed as legally binding states to human rights provisions in a manner unprecedented in the history of international human

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Rodríguez Cedeño & María Isabel Torres Cazorla, "Unilateral Acts of States in International Law" in Rüdiger Wolfrum (dir.) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2012) Vol. X, 162.

rights law, although the wisdom of that strategy merits further consideration.

The positive results of the UPR seem linked to its political nature and the fact that this human rights monitoring mechanism is led by States rather than expert bodies. This is its distinctive trait and attempts to evaluate its results without understanding its political nature are theoretical exercises with little value. The cooperative dimension (and its perception as such by certain States) is important, and has so far led to a practice of equal treatment often lacking in the workings of the former Commission. Still, as has been pointed out before, no mechanism is purely cooperative or confrontational, with all human rights monitoring bodies tending to mix confrontational and cooperative approaches to greater or lesser degrees. This is also the case of the UPR mechanism. A State not appearing before the UPR would clearly lose face. Likewise for a State not to follow up on UPR recommendations may result in embarrassment, something that can only be evaluated after completion of the second cycle.

Naming and shaming still has an important place in the practice of international human rights: mainly when used by NGOs and human rights bodies to highlight the results of the UPR. Such approaches are likely to complement the more diplomatic ethos of the HRC. In addition a number of states on the Human Rights Council have maintained more confrontational forms of scrutiny, thereby illustrating that the UPR is a mechanism which is capable of embodying a range of methods for assessing human rights realization.

The UPR has the potential to play a significant role in the formation, definition, clarification and consolidation of human rights customary rules. The publicity and characteristics of the forum, and the personalities accepting UPR recommendations, provide a unique context in which the public promises made by States could be construed as unilateral acts which fulfil the requirements for establishing new binding obligations. More time and research is needed to analyse the content of these promises, and whether or not States are

undertaking them with the clear intention to be legally bound by them. However, the potential for the UPR to act in this manner is clearly there. At the very least, it is providing an exceptional source of data regarding the *opinio juris* of States regarding human rights obligations worldwide.

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